Supreme Court, U. S.
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No. 80-253

In the Supreme Court of the United States

October Term, 1980

EARLE YANOWITZ,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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QUESTIONS PRESENTED

As is relevant to this Petition, Petitioner was tried and convicted of violating Ohio Revised Code § 2925.03, specifically, possession of cocaine, and violating Ohio Revised Code § 2925.11, specifically, drug abuse, based upon a search conducted pursuant to a search warrant issued without probable cause. The questions thereby arising are:

(1) Whether probable cause to issue a search warrant exists solely from the uncorroborated statements of an unidentified informant who claimed to have observed contraband in the home of the Petitioner on "numerous occasions" without indicating how recently the observations were made, and without any further information that contraband could reasonably be expected to be found in the home at the time of the issuance of the search warrant.

(2) Whether probable cause to issue a search warrant exists solely from an affidavit of a police officer, containing only hearsay information obtained from a second police officer as to oral statements made to him by an unidentified informant, where no underlying circumstances were set forth in the affidavit demonstrating the credibility of the informant or the reliability of his information.

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No. .....

In the Supreme Court of the United States

October Term, 1980

EARLE YANOWITZ,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

The Petitioner, Earle Yanowitz, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Ohio rendered in these proceedings on June 27, 1980.

OPINIONS BELOW

Prior to trial, on June 16, 1978, the Court of Common Pleas of Cuyahoga County, Ohio, conducted a hearing on Petitioner's Motion to Suppress, and overruled the Motion without a written opinion. An excerpt of the transcript containing the Court's decree is contained at Appendix H, *infra,* pp. A25-A26. A trial commenced on July 14, 1978, and on July 18, 1978 the jury returned a verdict of guilty on all counts as charged in the indictment. A Journal Entry based upon the jury verdict was signed by the Court. A copy of the Journal Entry appears at Appendix G, *infra,* pp. A22-A23. The Journal Entry and opinion of the Court of Appeals of Ohio, Eighth District, is unreported, and appears at Appendix E, *infra,* pp. A5-A19. The Supreme Court of

Ohio, on June 6, 1980, overruled Petitioner's Motion for Leave to Appeal from the Court of Appeals, and dismissed Petitioner's appeal *sua sponte*, for the reason that "no substantial constitutional question exists". Copies of those entries are at Appendices B and C, respectively, *infra*, pp. A2 and A3. On June 27, 1980, the Supreme Court of Ohio denied Petitioner's Motion for Rehearing without opinion. A copy of that entry is at Appendix A, *infra*, p. A1.

JURISDICTION

The order or judgment of the Supreme Court of Ohio was entered on June 27, 1980. This Petition for Certiorari is being filed within sixty days from the date aforesaid, and jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Section I of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

Section 2925.03 of the Ohio Revised Code provides in pertinent part as follows:

> "No person shall knowingly . . . possess a controlled substance in an amount equal to or exceeding the bulk amount but in an amount less than three times that amount . . ."

Section 2925.11 of the Ohio Revised Code provides in pertinent part as follows:

> "No person shall knowingly obtain, possess, or use a controlled substance."

STATEMENT OF FACTS

Relying on an anonymous telephone tip, Cleveland Police officers proceeded to Room 217 of the Marriott Inn located in Cleveland, Ohio. They knocked and were admitted by a male not previously known by them, who consented to a search of the room (R. 157, 158, 180, 195). Later that evening Officer John Hoyt of the Lakewood, Ohio, Police Department prepared an affidavit to obtain a search warrant (Suppression Hearing Tr. 8, R. 197), relating therein only the information conveyed to him by the Cleveland Police officers, as told to them by the unidentified male. The Affidavit, which was the *sole* basis for the issuance of the search warrant for the premises at 12590 Lake Avenue, Lakewood, Ohio (R. 5-9, Suppression Hearing Tr. 25), contained the following information:

> "During the course of a narcotics investigation, Det. Hoyt learned the following information from Det. Richard Rutt, a member of the Cleveland Police Narcotic Unit.

That Det. Rutt on October 6, 1977 has arrested a male for possession of cocaine during the course of the arrest and investigation of the male arrested Det. Rutt learned that the cocaine that the male had that was arrested was to be delievered [sic] to 12590 Lake Rd. to a Earl [sic] Yanowitz. A telephone conversation between the arrested male and a male identifing [sic] himself as Earl [sic] Yanowitz was overheard by Det. Rutt and Yanowitz stated he wanted the arrested male to bring the cocaine over to his house, and that he had customers coming at 9:00 PM tonight. He stated his address was 12590 Lake Ave., and this was also overheard by Det. Rutt.

The arrested male stated that he had been over to the house on Lake Ave. on numerous occasions, and that Yanowitz has always had marijuana in plain view in the house. He also stated that Yanowitz used cocaine and that he would have his own personal supply in the house, and that would be in addition to the 2 ounces of cocaine that he was to purchase.

During the arrest of the male with 2 ounces of cocaine a notebook was found belonging to the male and in the notebook was the name Earl [sic] Yanowitz with a phone number 228-3930. Det. Neelon had arrested male call this number and a male named Earl [sic] told the arrested male to get over there right away because he had customers waiting, and he already lost 400 dollars. Det. Neelon overheard the conversation.

Predicated on the foregoing affiant [sic] avers that it is urgently necessary that the above described premises be searched in the night season forthwith to prevent the above named property from being concealed or removed so as not to be found."

(The entire affidavit is reproduced at Appendix J, *infra*, pp. A29-A30 and the search warrant at Appendix I, *infra*, pp. A27-A28.)

Upon entering the premises at 12590 Lake Avenue, pursuant to the search warrant, the Lakewood and Cleveland Police officers searched the entire house and found narcotics in several rooms of the house. Prior to the search and arrest of Petitioner, he was neither known to the officers of the Lakewood or Cleveland Police Narcotics Units (R. 29, 86, 108, 161, 186-188, 207), nor had he ever been arrested for, or convicted of, a state or federal offense (R. 273-274).

On October 27, 1977, Petitioner was indicted by the Grand Jury of Cuyahoga County, Ohio for violations of Sections 2925.03 and 2925.11, Ohio Revised Code.

On February 14, 1978, Petitioner filed his Motion to Suppress Evidence, asserting that the search warrant was defective because it had been issued without probable cause. Prior to trial and after a hearing, the Motion was denied (Suppression Hearing Tr. p. 70, Appendix H, pp. A25-A26).

On July 14, 1978, trial commenced, and on July 18, 1978, the jury returned a verdict of guilty on each Count of the Indictment.

On August 17, 1978, Petitioner appealed to the Court of Appeals, Eighth Judicial District, Cuyahoga County, Ohio, from the verdict and judgment entered thereon, and raised the federal constitutional issue as to the lack of probable cause for the issuance of the search warrant (See Assignments of Error, *infra*, Appendix F). On March 3, 1980, the Court of Appeals affirmed the judgment of the Court of Common Pleas as to Counts I and III of the Indictment, and specifically upheld the validity of the search

warrant. The Court reversed the conviction on Count II of the Indictment, on issues which are not relevant to those before this Court, and remanded for resentencing.

Thereafter, Petitioner filed his Notice of Appeal to the Supreme Court of Ohio on March 20, 1980, and raised the constitutional issue of lack of probable cause as the sole basis for appeal in his Memorandum in Support of Jurisdiction filed April 18, 1980 (See Propositions of Law, *infra*, Appendix D).

REASONS FOR GRANTING THE WRIT

1. This Court has not delineated the principles to be applied by Courts, when assessing the timeliness of information provided by an informant, to establish the requisite probable cause necessary for issuance of search warrants.

The statement made to Cleveland Police officers by the unidentified informant, who was not previously known to them, that he had seen narcotics in Petitioner's home on "numerous occasions" *was the only information conveyed to the magistrate that narcotics would be found in Petitioner's home.* These facts raise an issue which has never been resolved by this Court, i.e. the timeliness of probable cause.

This Court has never set specific standards for lower federal or state courts to follow when determining whether facts set forth in an affidavit seeking a search warrant are too remote or unspecific in time to establish probable cause. As a result, the search warrant in the instant case, was issued *when no facts* were presented to the magistrate which even remotely suggested that contraband would be found on the premises *at the time of the issuance of the search warrant.*

The first requisite in determining whether probable cause exists, set forth by Mr. Justice Powell in *Spinelli v. United States,* 393 U.S. 410, 413 (1969), relying upon the test of *Aguilar v. Texas,* 378 U.S. 108 (1964), is whether the affidavit ". . . set forth any of the 'underlying circumstances' necessary to enable the magistrate independently to judge the validity of the informant's conclusion that the narcotics *were where he said they were.*" (emphasis added) The affidavit in the instant case, when read most favorably to the State, merely asserts that: (1) a person who identified himself as Petitioner, in a telephone conversation overheard by the Cleveland Police officer, requested that the unidentified informant bring cocaine to Petitioner's house as "customers" were coming that evening; and (2) that "on numerous occasions", the informant had observed that Petitioner had marijuana in plain view in the house and that he had used cocaine and had his "own personal supply in the house" (Affidavit, Appendix J).

In *United States v. Ventresca,* 380 U.S. 102, 103 (1965), the affidavit was dated August 31, 1961 and described ". . . seven different occasions between July 28 and August 30, 1961", when observations were made of the premises to be searched, therefore providing credence to the claims that contraband still existed therein.

The affidavit in the instant case is totally unlike the affidavit in *Ventresca.* In the instant case, no dates or times were given by the unidentified informant, who claimed to have observed contraband on the premises to be searched. This Court in prior decisions, as noted heretofore, has suggested that "underlying circumstances" set forth in an affidavit for a search warrant based upon information from an unidentified informant must relate to *current* probable cause, and not to probable cause which

may have existed some time in the past. However, a reading of those decisions fails to disclose that firm guidelines for determining when probable cause is current to satisfy that requirement.

Lower federal courts, as well as state courts, have discussed the time requirements of probable cause, in the absence of guidelines from this Court.[1] In *United States v. Salvucci*, 599 F.2d 1094 (1st Cir. 1979), *reversed on other grounds*, 48 U.S.L.W. 4881 (U.S., June 25, 1980),[2] the First Circuit affirmed a holding that an affidavit, directly analogous to the one in the case at bar, was insufficient and did not state probable cause. The First Circuit stated:

> ". . . the Fourth Amendment requires that the supporting affidavits set forth facts sufficient to allow a neutral magistrate to reasonably conclude that the property sought is located on the premises to be

---

1. E.g. *United States v. Diecidue*, 603 F.2d 535, 560 (5th Cir., 1979) ("Timeliness must be determined in the light of the particular circumstances of each case") *United States v. Weinrich*, 586 F.2d 481 (5th Cir. 1978), *cert. den. sub nom.* 440 U.S. 982 (1979), *Blair v. United States*, 440 U.S. 982 (1979) (Recitation of an isolated violation in the past does not provide probable cause, though a specific series of violations might) *United States v. Scott*, 555 F.2d 522 (5th Cir. 1977); *United States v. Tucker*, 481 F. Supp. 182 (E.D. N.Y. 1979) (To overcome staleness, the affidavit must contain facts showing a specific series of events or course of conduct); *United States v. Townsend*, 394 F. Supp. 736 (E.D. Mich. 1976) (Underlying facts were too remote from the time of issuance of the search warrant, the evidence seized must be suppressed); *United States v. Harruff*, 352 F. Supp. 224 (E.D. Mich. 1972); *United States v. Roberts*, 333 F. Supp. 786 (E.D. Tenn. 1971) (An affidavit must show a present offense and not an anticipated offense); *State v. Smith*, 381 A.2d 1117 (Maine 1978) (Information given eighty-eight days prior to signing of affidavit was stale and therefore not the basis of a proper search warrant); *Ashley v. State*, 251 Ind. 359, 241 N.W.2d 264 (1968) (An allegation that a narcotics sale had occurred eight days prior to execution of the search warrant was held to be too remote).

2. The existence or lack thereof of probable cause was not discussed by this Court in *Salvucci*. The opinions were limited to the issue of standing.

searched at the time the warrant issues. *Rosencranz v. United States,* 356 F.2d 310, 314-18 (1st Cir. 1966) . . . *The fatal defect in the present affidavit is that it does not disclose the date of the conversation overheard by the informant in which Zackular stated that the checkwriter used to print forged checks was being kept at his wife's apartment in Melrose. Without this date, there was no way for the magistrate to determine whether the information was sufficiently timely to support the warrant.* The absence of any reasonably specific averment as to the time of this conversation is fatal to the warrant. *Rosencranz v. United States, supra* at 315-18." *Id.* at 1096 (emphasis added)

"The affidavit simply states that 'prior to this date [the date of the warrant application] it [the informant] was present during a conversation in which Joseph G. Zackular had stated he had a checkwriter which was being kept at his wife's apartmen. Melrose.' (emphasis added). *It is impossible . know from the affidavit if the conversation occurred days, months, or years prior to the application for the warrant.* As stated by this Court in *Rosencranz v. United States, supra* at 318, 'undated, conclusory information from an anonymous source . . . with no other reasonably specific clues to the time' is inadequate to justify a finding of probable cause." *Id.* at 1097 (emphasis added)

Similarly, the Supreme Court of Louisiana held an affidavit insufficient to establish probable cause because it ". . . lacked a time frame . . ." from which the issuing judge could have determined whether the alleged facts were sufficiently current. *State v. Thompson,* 354 So.2d 513, 515 (La. 1978).

Without guidance from this Court, lower federal courts and state courts are unable to uniformly apply standards to determine when facts contained in affidavits are sufficently current to establish probable cause in order to protect individuals' Fourth and Fourteenth Amendment rights. Without such standards or guidelines, blatant contradictions such as *United States v. Salvucci, State v. Thompson, supra,* and the case at bar will continue.

In fact, the Court of Appeals of Cuyahoga County, Ohio, in the instant case, found itself without such standards and guidelines and stated:

> ". . . Admittedly, the determination of probable cause in the case at bar is a close one. As the appellant correctly points out, the affidavit does not aver specific dates or that the marijuana which informant alleged he had always seen during his visits was still in appellant's residence at the time of the warrant . . ." (*infra,* Appendix E, p. A15).

However, Petitioner insists that, contrary to the statement by the Court of Appeals, the determination of probable cause in the instant case was not a "close one". The Court of Appeals found itself, as other courts have found themselves, without adequate standards or guidelines and mistakenly believed that in "doubtful or marginal" cases the doubt should be resolved in favor of affirming the decision of the trial court and the magistrate, thereby depriving the Petitioner of the guarantee and protection of the Fourth Amendment.

2. The decision of the Ohio Supreme Court and the lower state Courts herein are inconsistent with the decisions of this Court in Aguilar v. Texas and Spinelli v. United States, as they did not properly apply the "two-prong" test to credit hearsay information furnished by an unidentified informant to determine if probable cause existed.

The affidavit herein did not provide the magistrate with a "substantial basis" for giving credence to the hearsay contained therein which is necessary, as required by *Jones v. United States*, 362 U.S. 257, 697 (1960). Stated simply, the affidavit did not meet the requirements set forth in *Aguilar v. Texas, supra*, subsequently coined in *Spinelli v. United States, supra* at 642, as a "two-pronged" test. The affidavit contained neither (1) some of the ". . . 'underlying circumstances' necessary to enable the magistrate independently to judge of the validity of the informant's conclusion that the narcotics were where he said they were . . ." nor (2) a basis to conclude that the informant was ". . . 'credible' or his information 'reliable' ". *Id.* at 393 U.S. at 413.

Nothing in the affidavit remotely suggested either (1) that the informant was reliable; or (2) that he had provided reliable information in the past. The affidavit consisted merely of voluminous hearsay, devoid of corroborative facts or verification of the informant's reliability or credibility.

Nothing in the affidavit herein suggested that there was contraband in Petitioner's house *at the time that the affidavit was made or the time that the warrant was issued.* The affidavit did not state *when*, in point of time, the unidentified informant claims to have observed contraband in Petitioner's home. The observations of the informant could have taken place a month, six months or years prior

to the signing of the affidavit. Further, the content of the conversation between the informant and Petitioner, alleged in the affidavit, was only that Petitioner wanted the unidentified informant to deliver the contraband to him "right away" as he had "customers" coming and had already lost sales. The most reasonable inference that could have been drawn by the magistrate from that conversation was that *contraband was not in the home, since Petitioner was awaiting its delivery.*

A review of this Court's decisions, in which affidavits in support of search warrants for contraband were approved, demonstrates that the affidavits in issue therein were specific, and, therefore, distinguishable from the affidavit in the instant case. In *United States v. Harris,* 403 U.S. 573, 723 (1971), the affidavit contained the hearsay statement of an unidentified informant that within *the "past two weeks"* illicit whiskey was purchased from the premises to be searched and that for a period of two years the informant had knowledge that illicit whiskey was stored there. Additionally, the federal investigator who signed the affidavit specifically stated therein that he personally had knowledge that the subject had been a trafficker in "non-tax paid distilled spirits" for over four years.

In the instant case, neither the informant (R. 58, 180-181, 195) nor Petitioner (R. 29, 86, 108, 161, 186-188, 207) was known to either the arresting officers or to the affiant. Neither the arresting officers, the affiant, nor the magistrate had any information as to the informant's reliability and credibility or any information as to the Petitioner's background. Therefore, the statements made by the informant, at the time of his arrest, must be reviewed in this context.

The informant, when arrested with cocaine in his possession, told the arresting officers, who in turn related the information to the affiant, that he ". . . had been over

to the house on Lake Ave. on numerous occasions and that [Petitioner] has always had marijuana in plain view in the house." (Affidavit, Appendix J, pp. A29-A30).

This is not a case similar to *United States v. Harris, supra,* where the Petitioner was known to the police as an offender prior to the subject search. In *Harris,* the information was deemed reliable because the information was corroborated by the officer's knowledge that the defendant therein trafficked in contraband whiskey.

Contrary to *Harris,* Petitioner herein was totally unknown to the police. There were no facts to corroborate the informant's information that narcotics were present on the premises. None of the information provided by the unidentified informant demonstrated that contraband existed at the premises to be searched at the time the affidavit was prepared and the warrant issued. Assuming that the information was reliable, all that it could have possibly implied was that Petitioner apparently was waiting for the informant to deliver contraband and that Petitioner *did not have contraband in his possession* at the time that the affidavit was signed and the warrant issued.

In the instant case, a clear reading of the affidavit demonstrates, on its face, that no probable cause existed for believing that contraband would be found at Petitioner's home at the time of the search. Consequently, the search warrant, which resulted in seizing the evidence upon which Petitioner's conviction was based, was issued without probable cause. This illegally obtained evidence, seized in violation of the Fourth Amendment, resulted in Petitioner's illegal conviction.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment of the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX A

Order of the Supreme Court of Ohio Denying Motion for Rehearing

(Dated June 27, 1980)

No. 80-567

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,
Appellee,

vs.

EARLE YANOWITZ,
Appellant.

It is ordered by the court that rehearing in this case is denied.

APPENDIX B

Order of the Supreme Court of Ohio Overruling Motion for Leave to Appeal

(Dated June 6, 1980)

No. 80-567

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,
Appellee,

vs.

EARLE YANOWITZ,
Appellant.

MOTION FOR LEAVE TO APPEAL FROM THE
COURT OF APPEALS FOR
CUYAHOGA COUNTY

It is ordered by the Court that this motion is overruled.

APPENDIX C

Order of the Supreme Court Dismissing the Appeal

(Dated June 6, 1980)

No. 80-567

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,
Appellee,

VS.

EARLE YANOWITZ,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX D

Propositions of Law in the Supreme Court of Ohio

1. A search warrant issued upon an affidavit of a police officer which contained only hearsay information from another police officer as to statements made to him by an unidentified informant is invalid when no facts were set forth in such affidavit to demonstrate that the informant was credible or that his information was reliable.

2. A search warrant based upon the uncorroborated statements of an unidentified informant that he had observed contraband in the home of the accused on "numerous occasions" without indicating how recent the observations were made is invalid, without further information from such informant that contraband was present in the home of the accused at the time of the issuance of the warrant.

APPENDIX E

Journal Entry and Opinion of the Court of Appeals of Cuyahoga County, Ohio

(Dated February 22, 1980)

No. 39784

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,
Appellee

vs.

EARLE YANOWITZ,
Appellant

JOURNAL ENTRY AND OPINION

JACKSON, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed in part and reversed in part. Each assignment of error was reviewed and upon review the following disposition made:

See Opinion, Jackson, J., Attached Hereto and Incorporated by reference.

It is ordered that appellee(s) recover of appellant(s) his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ LEO A. JACKSON
Judge

STILLMAN, *P.J.*, PRYATEL, *J.*, concur.

No. 39784

IN THE COURT OF APPEALS OF OHIO
CUYAHOGA COUNTY, EIGHTH DISTRICT

STATE OF OHIO,
Plaintiff-appellee

v.

EARLE YANOWITZ,
Defendant-appellant.

OPINION

SYLLABUS

1. A warrant issued pursuant to an affidavit which is based upon hearsay information is valid so long as it can be inferred from the affidavit that the information contained therein is reliable.

2. Where the affidavit discloses that an informant has made "numerous visits" to the home of the accused, and "always" observed marijuana on the premises, and where the affidavit contains underlying facts indicating

a present and continuing pattern of behavior by the accused involving the sale and possession of contraband material, a conclusion is justified that contraband is probably on the premises of the accused at the time of issuance of the warrant.

3. The state has the burden of proving each and every element of a criminal offense beyond a reasonable doubt.

4. To sustain a conviction for possession of marijuana in violation of R.C. 2925.03(A)(6), the burden is on the state to prove that the marijuana seized is in an amount "equal to or exceeding three times the bulk amount," and constitutes contraband material within the meaning of provisions of R.C. 3719.01(Q).

5. Marijuana seeds which have not been proven by the state to be capable of germination are not contraband material within the meaning of provisions of R.C. 3719.01(Q), and as such are prohibited from inclusion in determining an amount "equal to or exceeding three times the bulk amount" as required in R.C. 2925.03(A)(6).

JACKSON, *J.*:

Defendant-appellant, Earle Yanowitz, was indicted by the Cuyahoga County Grand Jury for two counts of trafficking in drugs in violation of R.C. 2925.03, and one count of drug abuse in violation of R.C. 2925.11. Defendant entered pleas of not guilty to each count contained in the indictment and subsequently filed a motion to suppress evidence. Following a hearing, the court overruled the motion to suppress. Trial was then had before a jury. which found the defendant guilty of all three counts as charged in the indictment.

Defendant appeals from his conviction and assigns two errors for review:

1. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-APPELLANT'S MOTION TO SUPPRESS EVIDENCE WHEN THE SUPPORTING AFFIDAVIT FOR THE SEARCH WARRANT WAS BASED ON HEARSAY DECLARATIONS OF AN UNIDENTIFIED ARRESTED MALE AND DID NOT CONTAIN SUFFICIENT FACTS TO ESTABLISH PROBABLE CAUSE.

2. THE TRIAL COURT ERRED IN FAILING TO TAKE FROM THE CONSIDERATION OF THE JURY EVIDENCE OF MARIJUANA SEED, WHERE THE STATE OFFERED NO EVIDENCE TO PROVE THAT THE SEED WAS CAPABLE OF GERMINATION AND NOT STERILE.

On October 6, 1977, Detective John Hoyt, a narcotics investigator for the Lakewood Police Department, obtained a warrant authorizing the search of appellant's residence located in Lakewood, Ohio. The warrant was secured on the basis of the following affidavit:

> Before me, Harold J. Craig, Judge of the Municipal Court of Lakewood, Ohio, personally appeared the undersigned Detective John Hoyt, who being first duly sworn, deposes and says that he is a member of the Lakewood Police Department and that he has good cause to believe that on the premises of 12590 Lake Avenue, said premises further described as being a red colored brick, single family dwelling, located on the north side of Lake Avenue, in the City of Lakewood, State of Ohio, and presently being occupied by a white male identified as Earl Yanowitz, approximately 32 years of age, and by three unidentified females, there is now being unlawfully kept, concealed and possessed certain property, to wit: cocaine, marijuana, a document of drug transactions.

The facts upon which the affiant bases such belief are as follows:

During the course of a narcotics investigation, Det. Hoyt learned the following information from Det. Richard Rutt, a member of the Cleveland Police Narcotic Unit.

That Det. Rutt on October 6, 1977 has arrested a male for possession of cocaine during the course of the arrest and investigation of the male arrested Det. Rutt learned that the cocaine that the male had that was arrested was to be delivered to 12590 Lake Rd. to a Earl Yanowitz. A telephone conversation between the arrested male and a male identifying himself as Earl Yanowitz was overheard by Det. Rutt and Yanowitz stated he wanted the arrested male to bring the cocaine over to his house, and that he had customers coming at 9:00 PM tonight. He stated his address was 12590 Lake Ave., and this was also overheard by Det. Rutt.

The arrested male stated that he had been over to the house on Lake Ave. on numerous occasions, and that Yanowitz has always had marijuana in plain view in the house. He also stated that Yanowitz used cocaine and that he would have his own personal supply in the house, and that would be in addition to the 2 ounces of cocaine that he was to purchase.

During the arrest of the male with 2 ounces of cocaine a notebook was found belonging to the male and in the notebook was the name Earl Yanowitz with a phone number 228-3930. Det. Neelon had arrested male call this number and a male named Earl told the arrested male to get over there right away because he had customers waiting, and he already lost 400 dollars. Det. Neelon overheard the conversation.

> Predicated on the foregoing affiant avers that it is urgently necessary that the above described premises be searched in the night season forthwith to prevent the above named property from being concealed or removed so as not to be found.
>
> /s/ John Hoyt

Det. Hoyt executed the search warrant on October 6, 1977, resulting in the confiscation of various bags and vials containing marijuana, cocaine and LSD.

Appellant contends in his first assignment of error that the affidavit of Detective Hoyt is deficient and that the court erred when it overruled his motion to suppress. The record in the case at bar does not show that additional evidence was obtained, recorded or made a part of the affidavit pursuant to Crim. R. 41(C) to support a finding of probable cause. Therefore, the validity of the search warrant must be determined solely from the contents of the affidavit. *State v. Eichhorn* (1975), 47 Ohio App. 2d 227, 229.

From the inception, we recognize that courts of review generally allow the magistrate broad discretion to decide that probable cause exists in order to encourage law enforcement officers to seek warrants. *United States v. Ventresca* (1965), 380 U.S. 102, 108-109. The Ohio Supreme Court has recognized the preference to be accorded warrants. *State v. Karr* (1975), 44 Ohio St. 2d 163, 167.

When seeking a warrant, the affidavit should state sufficient facts to allow a magistrate, weighing the evidence in a common sense manner, to make an independent judgment about probable cause. *United States v. Ventresca, supra,* at 108; *Aguilar v. Texas* (1964), 378 U.S. 108, 111. An affidavit is not rendered deficient because

it is based on hearsay statements of an informant, so long as there is "a substantial basis for crediting the hearsay." *Jones v. United States* (1960), 362 U.S. 257, 269. This may be accomplished through the application of the two-pronged test enunciated in *Aguilar*:

> [T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was "credible" or his information "reliable." *Aguilar v. Texas, supra,* at 114. *See also Spinelli v. United States* (1969), 393 U.S. 410, 415.

Thus, *Aguilar* requires an examination of both the underlying circumstances upon which the informant based his conclusions, and the credibility of the informant. If the information from the informant is inadequate under *Aguilar* to establish probable cause, the court may consider other allegations in the affidavit which corroborate the information given by the informant. *Spinelli v. United States, supra,* at 415; *United States v. Harris* (1971), 403 U.S. 573. For example, it was held in *United States v. Harris, supra,* that a finding of probable cause may rest on a tip from an untested informant who manifested personal knowledge of the criminal activity if other factors substantiate the suspect's involvement in the crime and thereby provide a basis for crediting the informant's statements. 403 U.S. at 579-580, 583. *See also United States v. Dudek* (6th Cir. 1977), 560 F. 2d 1288, 1292-1293; *United States v. Gill* (6th Cir. 1977), 555 F. 2d 597, 599.

In the case at bar, the affidavit averred that an unnamed male (hereinafter "informant") was arrested for possession of cocaine on October 6, 1977 by Detective

Richard Rutt of the Cleveland Police Narcotics Unit. The informant told Detective Rutt that the cocaine in his possession was supposed to be delivered to and purchased by the appellant. The informant stated further that he had been to appellant's residence on "numerous occasions," and that informant had always seen marijuana in his house, and that appellant also had his own personal supply of cocaine. In a telephone conversation overheard by Detective Rutt between informant and an individual identifying himself as the appellant, appellant told informant to bring the cocaine as he had customers coming later that night. Appellant gave his address as 12590 Lake Avenue, Lakewood.

A notebook was found in the informant's possession following his arrest which contained the name and telephone number of the appellant. Cleveland Detective Neelon had the informant call the number in the notebook and listened to the conversation. Detective Neelon overheard an individual, who identified himself as the appellant, tell informant to get over to his house right away because he had customers waiting.

The information contained in the affidavit was prepared by Detective Hoyt of the Lakewood Police Department, as transmitted to him by Detective Rutt. The circumstances of double hearsay as alleged by appellant does not present a problem in the case at bar, if it can be reasonably inferred from the affidavit that the information contained therein was reliable. As the United States Supreme Court stated in *Aguilar*:

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant [citations omitted] the magistrate must be informed of some of the underlying circumstances from which the informant concluded

> that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed [citations omitted] was "credible" or his information "reliable".

See also Rugendorf v. United States (1964), 376 U.S. 528, 530.

The central issue, then, is whether the affidavit presented a sufficient factual basis for the magistrate to conclude that there was probable cause to believe that contraband was to be found on the premises of appellant.

While it is apparent from the affidavit that the informant was not known to the arresting officers prior to his arrest, the credibility of the informant was adequately established by the telephone conversation with appellant which corroborated his story that he knew the appellant and had been prepared to sell him cocaine. *See Spinelli v. United States, supra.*

To determine whether the second prong of the *Aguilar* test was satisfied, i.e., the reliability of the underlying circumstances on which the informant based his conclusions, courts have generally looked for specific evidence indicating that the informant has some *personal knowledge* of the crime. *See* e.g., *United States v. Kahan* (2nd Cir. 1978), 572 F.2d 923, 929; *United States v. Fleming* (8th Cir. 1977), 566 F. 2d 623, 625; *United States v. Gonzales* (2nd Cir. 1977); 555 F. 2d 308, 312; *United States v. Dudek* (6th Cir. 1977), 560 F. 2d 1288, 1293. Cf. *United States v. Craemer* (6th Cir. 1977), 555 F. 2d 594, 596. In the present case, it should be emphasized that the search warrant was directed at the possession of controlled substances by appellant at his residence. The affidavit averred that the informant had visited appellant at his home on "numer-

ous occasions" and had always viewed marijuana there. The informant further stated he was aware that appellant also kept in his home a "personal supply" of cocaine. Therefore, the second prong of the *Aguilar* test, was adequately established based on personal knowledge of the informant. Cf. *State v. Gill* (1977), 49 Ohio St. 2d 177, 180 (Locher, J., dissenting).

However, the affidavit is silent as to when the informant visited appellant's residence, and when the contraband was viewed by the informant. Appellant argues that because the affidavit did not aver that any narcotics were *presently* in his home, and because narcotics are frequently moved or destroyed, there were insufficient facts to justify a conclusion that the subject contraband was probably at appellant's home at the time the warrant was issued.

If a substantial period of time has elapsed between the commission of the crime and the proposed search, the magistrate must have presented to him sufficient underlying facts to believe that the items seized are still on the premises before a warrant may be issued. Cf. *United States v. Matthews* (9th Cir. 1977), 572 F. 2d 208, 209 and *United States v. Morris* (5th Cir. 1978), 565 F. 2d 951, 953. Various federal circuit courts, as reviewed in *State v. Marks* (1973), 36 Ohio App. 2d 114, 118-120, have held that there is no arbitrary time limit on how old information contained in an affidavit may be, so long as there are sufficient facts to justify a conclusion that the subject contraband is probably on the person or premises to be searched at the time the warrant is issued. *See United States v. Johnson* (10th Cir. 1972), 461 F. 2d 285; *Durham v. Johnson* (9th Cir. 1968), 403 F. 2d 190; *United States v. Guinn* (5th Cir. 1972), 454 F. 2d 29; *Schoeneman v. United States* (D.C. Cir. 1963), 317 F. 2d 173.

In the case at bar, the affidavit disclosed that the informant had "always" observed marijuana in appellant's premises during his "numerous" visits. This information clearly suggests a continuing pattern of behavior. That appellant was continuing this pattern of behavior at the time the warrant was issued was reinforced in the affidavit by the two telephone conversations which occurred on the date the warrant was issued between the informant and appellant. These conversations disclosed that appellant was engaged in a continuing course of conduct which involved the possession of illegal drugs. As the Tenth Circuit Court of Appeals pertinently stated:

> Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, *where the affidavit properly recites facts indicating activity of a protracted and, continuous nature, a course of conduct, the passage of time becomes less significant.* (Emphasis added.) *United States v. Johnson, supra,* at 287.

Admittedly, the determination of probable cause in the case at bar is a close one. As the appellant correctly points out, the affidavit does not aver specific dates or that the marijuana which informant alleged he had always seen during his visits was still in appellant's residence at the time of the warrant. The guiding policy for a reviewing court in such circumstances has been unequivocally stated by the United States Supreme Court: ". . . the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States v. Ventresca, supra,* at 108. *See also Jones v. United States, supra,* at 270-271. With the evidence in this posture, we are persuaded that the affidavit contained sufficient underlying facts

which, in their totality, would justify a conclusion that there was marijuana in appellant's residence at the time the warrant was issued. Appellant's first assignment of error is not well taken.

Appellant contends in his second assignment of error that the trial court erred in overruling a defense motion for acquittal on Count II of the indictment. Count II of the indictment charged that defendant ". . . did knowingly possess a controlled substance, to-wit: Marijuana, being an amount equal to or exceeding three times the bulk amount . . ." R.C. 2925.03(A)(6). Bulk amount is defined in R.C. 2925.01(E)(3) as "an amount equal to or exceeding two hundred grams of marijuana . . ." Appellant was therefore charged with possession of marijuana in an amount equal to or exceeding 600 grams.

In the state's case-in-chief, Ben Carlozzo, a chemist for the Ohio Bureau of Criminal Identification and Investigation, testified that State Exhibit 6 consisted of 1 bag containing 138 grams of marijuana seeds and marijuana plant material; that State Exhibit 7 consisted of six bags containing 1,186.9 grams of marijuana seeds and marijuana plant stems; that State Exhibit 9 consisted of a box containing 488 grams of marijuana seeds and marijuana plant material; and that State Exhibit 12 consisted of 9 vials containing 38.6 grams of marijuana plant material (T. 120-124). The total amount of marijuana material seized was 1,851.5 grams.

On cross-examination, Mr. Carlozzo testified that approximately 75% of the total contents of Exhibits 6, 7, 9 and 12, or approximately 1,388.6 grams consisted of seeds. No evidence was offered by the state whether the seeds were capable of germination. Appellant contends that since R.C. 3719.01(Q) excludes from the definition of marijuana "the sterilized seed of the plant which is in-

capable of germination," and since the state failed to prove the seeds seized were capable of germination, it was error for the court to allow the jury to include 1,388.6 grams of seeds in determining the total amount of marijuana in the possession of appellant. Since the total amount of marijuana seized, excluding the seeds, was 463 grams, appellant argues he could at best have been found guilty of violating R.C. 2925.03(A)(4) for possessing marijuana in an amount exceeding the bulk amount, but less than three times the bulk amount.

The issue raised herein by appellant is whether a matter excluded from the definition of marijuana by statute should be deducted from the total weight of the mixture possessed by the offender in determining whether or not he possessed a bulk amount. This issue is one of first impression in Ohio.

The provisions of R.C. 3719.01(Q) defines marijuana as follows:

> "Marijuana" means *all parts of any plant of the genus cannabis, whether growing or not, the seeds thereof;* the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. *It does not include* the mature stalks of the plant, fiber produced from the stalks, oils or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake, or *the sterilized seed of the plant which is incapable of germination.* (Emphasis added.)

Appellant argues that since the sterilized seeds of the marijuana plant are not contraband under the statute, the burden is upon the state to prove beyond a reasonable doubt that the seeds are capable of germination, and hence

do not come within the exclusion of R.C. 3719.01(Q). In support thereof, appellant cites two decisions from Florida and Nebraska. In *Purifoy v. State* (1978), 359 So. 2d 446 and *State v. Infante* (1977), 260 N.W. 2d 323, the Supreme Courts of Florida and Nebraska, respectively, ruled that the state had the burden of proving beyond a reasonable doubt that the quantity of marijuana seized exceeded the statutory amount after excluding matter not included in the definition of marijuana.

In *Purifoy,* the defendant was convicted of possession of more than 5 grams of marijuana. The defendant contended on appeal that the stalks of the marijuana material which were seized should have been excluded from the amount introduced into evidence because stalks are specifically excluded from the statutory definition of marijuana. The defendant contended the burden was upon the state to prove that the contraband, excluding the stalks, exceeded the statutory threshold of 5 grams. The Supreme Court of Florida agreed with this contention and concluded:

> In a case such as this, where a portion of the substance introduced by the state as contraband is claimed by the defendant to be nonprohibited matter, it becomes the state's burden to prove that the weight of the contraband matter alone exceeds the statutory threshold of five grams. To hold otherwise would not only place an intolerable burden on criminal defendants, but would contravene the fundamental rule that the prosecution must prove every essential element of the crime charged. *Purifoy v. State, supra,* at 449.

In the case at bar, the language of R.C. 3719.01(Q) is unequivocal: marijuana seeds incapable of germination are not contraband. The state argues that the better interpretation of R.C. 3719.01(Q) is that all excepted parts

of the marijuana plant (stalks, infertile seeds, etc.) should be excluded only when they are found by themselves, rather than mixed with the contraband parts of the plant. The state suggests that requiring deduction of excepted parts from a mixture would be a time-consuming practice and impractical.

While it may indeed be more difficult and time-consuming for laboratory analysts to determine the fertility of marijuana seeds, and to separate the the statutorily excluded parts, it is apparent from the language of R.C. 3719.01(Q) that this was the intent of the General Assembly. Moreover, we are persuaded that the rights of the defendant in such a matter are far more compelling.

It is a well-established principle that the state has the burden of proving each and every element of a crime beyond a reasonable doubt to sustain a conviction against an accused. *In re Winship* (1972), 397 U.S. 358. This burden may not be shifted to the defendant. *In re Winship, supra.* Nor may the state statute impose upon the defendant the burden of proving or disproving an element of the offense charged. *Mullaney v. Wilbur* (1975), 421 U.S. 684. To impose upon the accused the burden of proving that certain parts of a marijuana mixture are not contraband within the meaning of R.C. 3719.01(Q), and, must be excluded in determining whether the statutory threshold has been exceeded contravenes this basic rule.

Since the state failed to prove that the approximately 1,388.6 grams of marijuana seeds seized were contraband, within the meaning of R.C. 3719.01(Q), i.e., capable of germination, the seeds, therefore, were wrongfully included as evidence of contraband material in the case at bar. While the remaining 463 grams of marijuana material is indisputably contraband, that amount is not "equal to or exceeding three times the bulk amount," as charged in the

indictment. There was consequently insufficient evidence to convict appellant under R.C. 2925.03(A)(6). However, the evidence is plainly sufficient to establish guilt under R.C. 2925.03(A)(4), which only requires possession of marijuana in an amount greater than the bulk amount, but less than three times the bulk amount, i.e., between 200 and 600 grams.

Accordingly, the judgment of the trial court is affirmed in part and reversed in part, and the cause remanded for resentencing of the defendant pursuant to provisions of R.C. 2925.03(A)(4).

Judgment affirmed in part and reversed in part.

STILLMAN, *P.J.*, PRYATEL, *J.*, concur.

APPENDIX F

Assignments of Error in the Court of Appeals of Ohio, Eighth District

I. The search warrant through which all evidence used in this case was obtained failed to meet any of the constitutional or statutory criteria for "probable cause" and consequently all of the evidence so obtained should have been excluded.

A. Evidence illegally obtained by means of a defective search warrant is not admissible in a state court criminal proceeding.

B. When a search warrant is based on information allegedly obtained from an unnamed informant and when there is no recitation of any factual basis for a magistrate to ascertain the informant's reliability, "probable cause" for the issuance of a search warrant does not exist.

C. The affidavit upon which the search warrant in question was based set forth no facts whatsoever upon which a magistrate could have found "probable cause" to issue the said search warrant.

D. The information contained in the affidavit was "stale" and accordingly did not provide "probable cause".

II. The submission of a substance to a jury as evidence, three-quarters of which was marijuana seed, where the state offered no evidence to prove that the seed was capable of germination and was not sterile, constituted prejudicial error.

APPENDIX G

Journal Entry of the Court of Common Pleas

(Dated July 18, 1978)

No. CR 35607

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, CUYAHOGA COUNTY

STATE OF OHIO,
Plaintiff,

vs.

EARLE E. YANOWITZ,
Defendant.

INDICTMENT TRAFFICKING IN DRUGS, RC 2925.03, W/CT. SAME, W/CT. DRUG ABUSE, RC 2925.11

JOURNAL ENTRY

This day again comes the Prosecuting Attorney on behalf of the State and defendant, Earle E. Yanowitz was brought into Court, represented by counsel and the Jury duly impaneled and sworn and the trial proceeded.

An [sic] the said Jury, having heard all the testimony adduced, the arguments of counsel and the charge of the Court, alternate Juror is dismissed and the Jury retired to their room in charge of the Bailiff for deliberation.

Now comes the Jury, conducted into Court by the Bailiff and returned the verdicts in writing, to-wit: "We, the jury, do find the defendant, Earle E. Yanowitz, guilty of Aggravated Trafficking under RC 2925.03, the amount of cocaine involved being equal to but less than three (3)

times the bulk amount as defined by the Court, as charged in the first (1) count of the indictment." And, "We, the jury, do find the defendant, Earle E. Yanowitz, guilty of Trafficking in marijuana, under RC 2925.03, the amount of marijuana involved exceeding three (3) times the bulk amount as defined by the Court, as charged in the second (2) count of the indictment." And, "We, the jury, do find the defendant, Earle E. Yanowitz, guilty of Drug Abuse in violation of RC 2925.11, as charged in the third (3) count of the indictment."

Thereupon, the Court informed the defendant of the verdict of the jury.

Defendant was inquired of if he had anything to say why Judgment should not be pronounced against him and he having nothing but what he had already said and showing no good and sufficient cause why Judgment should not be pronounced.

It is therefore, ordered and adjudged by the Court that defendant, Earle E. Yanowitz be imprisoned and confined in the Columbus Correctional Facility, Columbus, Ohio, for a term of from two (2) years to ten (10) years under count one (1), of which there shall be eighteen (18) months actual incarceration, and pay a fine of three thousand dollars ($3,000.00). On count two (2) from one (1) year to ten (10) years at the Columbus Correctional Facility and from one (1) year to five (5) years at the Columbus Correctional Facility under count three (3), According to law and that he pay the costs of this prosecution for which execution is awarded.

Sentence of count two (2) to run concurrently with sentence under count one (1).

Sentence of count three (3) to run consecutively with sentences imposed on counts one (1) and two (2).

In the Aggregati, [sic] defendant to serve three (3) years to fifteen (15) years, in the Columbus Correctional Facility, fined three thousand dollars ($3,000.00) and costs.

Appeal bond set at three thousand dollars ($3,000.00) cash. Defendant released on bond pending Appeal and defendant's Motion for Stay of Execution of sentence pending Appeal granted.

Roland W. Riggs, Judge

bac 7-21-78

/s/ ROLAND W. RIGGS
Judge

APPENDIX H

Excerpts from Transcript of Suppression Hearing (pp. 68-70)

[68] The Court: This Court is called upon to rule on whether or not another Judge had probable cause to issuing the warrant.

The Court has read several times the [69] affidavit for search warrant.

The Court listened attentively to the answers of Detective Hoyt, to questions propounded by Defense Counsel and the Prosecutor.

The Court has carefully studied the language in 41-C, which justifies using hearsay provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

It doesn't say anything about double hearsay but undoubtedly the cases don't refer to it, but hearsay is permissible under 41-C provided it's credible, and there is no question about these police officers being credible, I assume, and as Detective Rutt and Detective—

Mr. Mears: Neelon, your Honor.

The Court: —Neelon, they go to the further trouble of having the arrested male or so-called informant call the telephone number that he had in his notebook and he answers on two occasions and indicates that response by the Defendant.

It could have been that when they got there, there wouldn't have been any contraband but [70] I am not required to rule on that phase of it at this time.

The question is did the Judge who heard and read the affidavit have sufficient matters before him that in his judgment there was probable cause for issuing the warrant, and the Court finds the Judge did have probable cause for issuing the search warrant.

And you may have your exception.

* * * * *

APPENDIX I

Search Warrant

IN THE MUNICIPAL COURT OF LAKEWOOD

STATE OF OHIO)
) SS
COUNTY OF CUYAHOGA)

TO: CHIEF OF POLICE OF THE CITY OF LAKEWOOD, OHIO, and John L. Hoyt

WHEREAS, there has been filed with the undersigned, Harold J. Craig, Judge of the Municipal Court of the City of Lakewood, Cuyahoga County, Ohio, an affidavit for search warrant consisting of one page a copy of which is attached hereto, designated as Exhibit A and incorporated herein as though fully rewritten, wherein the affiant avers that he has good cause to believe that on the premises known as 12590 Lake Avenue, said premises further described as being a red colored brick, single family dwelling, located on the north side of Lake Avenue, in the City of Lakewood, State of Ohio and presently occupied by Earle Yanowitz, a white male, approximately 32 years of age, and three unidentified females, there is now being unlawfully kept, concealed and possessed certain property, to wit: cocaine, marijuana, and documents of drug transactions.

I am satisfied that there is probable cause to believe that the property described is being concealed on the premises described and that grounds for the issuance of this search warrant exists.

You are hereby commanded in the name of the State of Ohio, with the necessary and proper assistance to serve

this warrant and search forthwith the premises named for the property specified and if the property, or any part thereof, be found there you are commanded to seize it, leaving a copy of this warrant and a receipt for the property taken, prepare a written inventory of the property seized and return this warrant and bring the property found on such search forthwith before me, to be disposed of and dealt with according to law.

Said search warrant is to be executed in the night season.

GIVEN under my hand this 6th day of October, 1977

/s/ HAROLD J. CRAIG

Judge, Lakewood Municipal Court

APPENDIX J

Affidavit for Search Warrant

IN THE LAKEWOOD MUNICIPAL COURT

STATE OF OHIO)
)
COUNTY OF CUYAHOGA)

Before me, Harold J. Craig, Judge of the Municipal Court of Lakewood, Ohio, personally appeared the undersigned Detective John Hoyt, who being first duly sworn, deposes and says that he is a member of the Lakewood Police Department and that he has good cause to believe that on the premises of 12590 Lake Avenue, said premises further described as being a red colored brick, single family dwelling, located on the north side of Lake Avenue, in the City of Lakewood, State of Ohio, and presently being occupied by a white male identified as Earl Yanowitz, approximately 32 years of age, and by three unidentified females, there is now being unlawfully kept, concealed and possessed certain property, to wit: cocaine, marijuana, a documents of drug transactions.

The facts upon which the affiant bases such belief are as follows:

During the course of a narcotics investigation, Det. Hoyt, learned the following information from Det. Richard Rutt, a member of the Cleveland Police Narcotic Unit.

That Det. Rutt on October 6, 1977 has arrested a male for possession of cocaine during the course of the arrest and investigation of the male arrested Det. Rutt learned that the cocaine that the male had that was arrested was to be delievered to 12590 Lake Rd. to a Earl Yanowitz. A telephone conversation between the arrested male and a

male identifing himself as Earl Yanowitz was overheard by Det. Rutt and Yanowitz stated he wanted the arrested male to bring the cocaine over to his house, and that he had customers coming at 9:00 PM tonight. He stated his address was 12590 Lake Ave., and this was also overheard by Det. Rutt.

The arrested male stated that he had been over to the house on Lake Ave. on numerous occasions, and that Yanowitz has always had marijuana in plain view in the house. He also stated that Yanowitz used cocaine and that he would have his own personal supply in the house, and that would be in addition to the 2 ounces of cocaine that he was to purchase.

During the arrest of the male with 2 ounces of cocaine a notebook was found belonging to the male and in the notebook was the name Earl Yanowitz with a phone number 228-3930. Det. Neelon had arrested male call this number and a male named Earl told the arrested male to get over there right away because he had customers waiting, and he already lost 400 dollars. Det. Neelon overheard the conversation.

Predicated on the foregoing affiant avers that it is urgently necessary that the above described premises be searched in the night season forthwith to prevent the above named property from being concealed or removed so as not to be found.

/s/ JOHN L. HOYT

SWORN to before me and subscribed in my presence this 6th day of October, 1977.

/s/ HAROLD J. CRAIG

Judge, Lakewood Municipal Court

APPENDIX K

The Constitution of the United States of America

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Constitution of the United States of America

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Constitution of the United States of America

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred

for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Ohio Revised Code § 2925.03

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance in an amount less than the minimum bulk amount as defined in section 2925.01 of the Revised Code;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another;

(3) Cultivate, manufacture, or otherwise engage in any part of the production of a controlled substance;

(4) Possess a controlled substance in an amount equal to or exceeding the bulk amount but in an amount less than three times that amount;

(5) Sell or offer to sell a controlled substance in an amount equal to or exceeding the bulk amount but in an amount less than three times that amount;

(6) Possess a controlled substance in an amount equal to or exceeding three times the bulk amount;

(7) Sell or offer to sell a controlled substance in an amount equal to or exceeding three times the bulk amount;

(8) Provide money or other items of value to another person with the purpose that the recipient of the money or items of value would use them to obtain controlled substances for the purpose of selling or offering to sell such controlled substances in amounts exceeding a bulk amount or for the purpose of violating division (A) (3) of this section.

(B) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4729., 4731., and 4741. of the Revised Code.

(C) If the drug involved is any compound, mixture, preparation, or substance included in schedule I with the exception of marihuana or in schedule II, whoever violates this section is guilty of aggravated trafficking.

(1) Where the offender has violated division (A) (1) of this section, aggravated trafficking is a felony of the third degree, and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree.

(2) Where the offender has violated division (A) (2) of this section, aggravated trafficking is a felony of the third degree, and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree.

(3) Where the offender has violated division (A) (3) of this section, aggravated trafficking is a felony of the second degree and the court shall impose a sentence of actual incarceration of three years and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the first degree and

the court shall impose a sentence of actual incarceration of five years.

(4) Where the offender has violated division (A)(4) of this section, aggravated trafficking is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months and if the offender has previously been convicted of a felony drug abuse offense, agravated [*sic*] trafficking is a felony of the second degree and the court shall impose a sentence of actual incarceration of three years.

(5) Where the offender has violated division (A)(5) or (A)(6) of this section, aggravated trafficking is a felony of the second degree and the court shall impose a sentence of actual incarceration of three years and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the first degree, and the court shall impose a sentence of actual incarceration of five years.

(6) Where the offender has violated division (A)(7) of this section, aggravated trafficking is a felony of the first degree and the court shall impose a sentence of actual incarceration of five years and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of at least seven years.

(7) Where the offender has violated division (A)(8) of this section, aggravated trafficking is a felony of the first degree and the court shall impose a sentence of actual incarceration of seven years and if the offender has preiously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of ten years.

(D) If the drug involved is any compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates this section is guilty of trafficking in drugs.

(1) Where the offender has violated division (A)(1) or (A)(2) of this section, trafficking in drugs is a felony of the fourth degree and if the offender has previously been convicted of a drug abuse offense, trafficking in drugs is a felony of the third degree.

(2) Where the offender has violated division (A)(3) of this section, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of one year and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of two years.

(3) Where the offender has violated division (A)(4) of this section, trafficking in drugs is a felony of the fourth degree and the court shall impose a sentence of actual incarceration of six months and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months.

(4) Where the offender has violated division (A)(5) of this section, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of one year and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of two years.

(5) Where the offender has violated division (A) (6) of this section, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of three years.

(6) Where the offender has violated division (A) (7) of this section, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of two years and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the first degree and the court shall impose a sentence of actual incarceration of four years.

(7) Where the offender has violated division (A) (8) of this section, trafficking in drugs is a felony of the first degree and the court shall impose a sentence of actual incarceration of five years and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of seven years.

(E) If the drug involved is marijuana, whoever violates this section is guilty of trafficking in marijuana.

(1) Where the offender has violated division (A) (1), (A) (2), (A) (3), or (A) (4) of this section, trafficking in marijuana is a felony of the fourth degree and if the offender has previously been convicted of a felony drug abuse ofense [*sic*], trafficking in marihuana is a felony of the third degree.

(2) Where the offender has violated division (A) (5) or (A) (6) of this section, trafficking in marihuana is a felony of the third degree and if the offender has previously

been convicted of a felony drug abuse offense, trafficking in marihuana is a felony of the second degree.

(3) Where the offender has violated division (A) (7) of this section, trafficking in marihuana is a felony of the second degree and the court shall impose a sentence of actual incarceration of six months and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of one year.

(4) Where the offender has violated division (A) (8) of this section, trafficking in marihuana is a felony of the second degree and the court shall impose a sentence of actual incarceration of one year, and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of two years.

(5) If the offense involves a gift of twenty grams or less of marihuana, trafficking in marihuana is a minor misdemeanor for the first offense and a misdemeanor of the third degree for any subsequent offense.

(F) It shall be an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge under this section for possessing a bulk amount of a controlled substance or for cultivating marihuana that the substance which gave rise to the charge is in such amount, in such form, or is prepared, compounded, or mixed with substances which are not controlled substances in such a manner, or is possessed or cultivated in any other circumstances whatsoever as to indicate that the substance was solely for personal use.

(G) When a person is charged with possessing a bulk amount or a multiple thereof, the jury, or the court trying

the accused shall determine the amount of the controlled substance involved at the time of the offense, and if a guilty verdict is returned shall return the findings as part of the verdict. In any such case, it is unnecessary to find and return the exact amount of the controlled substance and it is sufficient if the finding and return is to the effect that the amount of the controlled substance involved is a bulk amount or the requisite multiple thereof, or that the amount of the controlled substance involved is less than a bulk amount or the requisite multiple thereof.

Ohio Revised Code § 2925.11

(A) No person shall knowingly obtain, possess, or use a controlled substance.

(B) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Chapters 3719., 4715., 4729., 4731., and 4741. of the Revised Code. This section does not apply to any person who obtained the controlled substance pursuant to a prescription issued by a practitioner, where the drug is in the original container in which it was dispensed to such person.

(C) Whoever violates this section is guilty of drug abuse:

(1) If the drug involved is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, drug abuse is a felony of the fourth degree, and if the offender has previously been convicted of a drug abuse offense, drug abuse is a felony of the third degree.

(2) If the drug involved is a compound, mixture, preparation, or substance included in schedule III, IV, or V, drug abuse is a misdemeanor of the third degree, and

if the offender has previously been convicted of a drug abuse offense, drug abuse is a misdemeanor of the second degree.

(3) If the drug involved is marihuana, drug abuse is a misdemeanor of the fourth degree unless the amount of marihuana involved is less than one hundred grams, the amount of marihuana resin, or extraction or preparation of such resin, is less than five grams, and the amount of such resin in a liquid concentrate, liquid extract, or liquid distillate form, is less than one gram, in which case drug abuse is a minor misdemeanor.

(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

Supreme Court, U. S.
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No. 80-253

In the Supreme Court of the United States

October Term, 1980

EARLE YANOWITZ,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Ohio, Eighth Appellate District, and in the Supreme Court of Ohio. The Court of Appeals affirmed the petitioner's conviction, but modified it in a non-relevant aspect. The Supreme Court of Ohio disallowed the motion for leave to appeal, and thereby affirmed the conviction.

The three Ohio Courts involved in this case have decided it in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal questions are presented by the petition for certiorari.

COUNTER QUESTIONS OF LAW

1. The trial court did not act contrary to the Fourth Amendment of the United States Constitution, when it denied the motion to suppress evidence seized in the search of petitioner's home, pursuant to a lawful search warrant.

2. This Court has adequately delineated the principles to be applied by courts when assessing the timeliness of information provided by an informant, to establish the requisite probable cause necessary for issuance of search warrant.

3. The decision of the Ohio Supreme Court and the lower state courts herein are fully consistent with this Court's decisions in *Aguilar v. Texas* (1964), 378 U.S. 108 and *Spinelli v. United States* (1969), 383 U.S. 410.

STATEMENT OF THE CASE

On October 6, 1977, an officer of the Cleveland Police Department Narcotics Unit received an anonymous telephone call, as a result of which he and other Cleveland Police Officers proceeded to Room 207 of the Marriott Inn located in Cleveland, Ohio. They knocked and were admitted by a male not known by them who consented to a search of the room (R. 157, 158, 180, 195). Later that evening, Officer John Hoyt of the Lakewood Police De-

partment Narcotics Unit prepared an affidavit (R. 8 - Suppression Hearing, R. 197) which contained the following information given to him by the Cleveland Police Officers as to what transpired in Room 207 after they searched the room:

"During the course of a narcotics investigation, Detective Hoyt learned the following information from Detective Richard Rutt, a member of the Cleveland Police Narcotic Unit. That Detective Rutt on October 6, 1977 has arrested a male for possession of cocaine during the course of the arrest and investigation of the male arrested Detective Rutt learned that the cocaine that the male had that was arrested was to be delivered to 12590 Lake Road to a Earl Yanowitz. A telephone conversation between the arrested male and a male identifying himself as Earl Yanowitz was overheard by Detective Rutt and Yanowitz stated he wanted the arrested male to bring the cocaine over to his house, and that he had customers coming at 9:00 PM tonight. He stated his address was 12590 Lake Avenue, and this was also overheard by Detective Rutt. The arrested male stated that he had been over to the house on Lake Avenue on numerous occasions, and that Yanowitz has always had marijuana in plain view in the house. He also stated that Yanowitz used cocaine and that he would have his own personal supply in the house, and that would be in addition to the 2 ounces of cocaine that he was to purchase. During the arrest of the male with 2 ounces of cocaine a notebook was found belonging to the male and in the notebook was the name Earl Yanowitz with a phone number 228-3930. Detective Neelon had arrested male call this number and a male named Earl told the arrested male to get over there right away because he had customers waiting, and he already lost 400 dollars.

> Detective Neelon overheard the conversation. Predicated on the foregoing affiant avers that it is urgently necessary that the above described premises be searched in the night season forthwith to prevent the above named property from being concealed or removed so as not to be found."

Officer Hoyt also prepared the search warrant for a night search of the premises located at 12590 Lake Avenue, Lakewood, Ohio (R. 6 - Suppression Hearing, R. 197). The affidavit and the search warrant were taken to the home of Lakewood, Ohio Municipal Judge Harold J. Craig, where Officer Hoyt swore to and signed the affidavit in the presence of Judge Craig. Judge Craig signed the search warrant based upon the statements contained in the aforesaid affidavit (R. 5-9 - Suppression Hearing, R. 25).

Immediately thereafter, officers of the Lakewood and Cleveland Police Departments proceeded to 12590 Lake Avenue, Lakewood, Ohio.

Upon entering the premises, they commenced to search the house and found various bags and vials containing marijuana, cocaine and LSD. Petitioner Yanowitz was in his bedroom on the second floor when the officers entered the house. Much of the contraband was found in that room (R. 29, 36).

Prior to the search and arrest of Petitioner Yanowitz, he was not known to the officers of the Lakewood or Cleveland Police Narcotics Units (R. 29, 86, 108, 161, 186-188, 207).

On October 27, 1977, Earle Yanowitz, was indicted by the Grand Jury of Cuyahoga County for violations of Sections 2925.03 and 2925.11 of the Ohio Revised Code (i.e. possession of cocaine in an amount equal to or exceeding bulk but less than three times bulk; possession of mari-

juana in an amount equal to or exceeding three times the bulk and possession of LSD less than bulk amount). At his arraignment on the indictment, Petitioner entered pleas of not guilty to each of the counts contained in the indictment.

On February 14, 1978, Petitioner filed his motion to suppress evidence.

On June 16, 1978, hearing was had on the motion to suppress evidence before the Honorable Perry B. Jackson, Judge of the Court of Common Pleas, Cuyahoga County, Ohio. After hearing the testimony of witnesses and arguments of counsel, Judge Jackson denied the motion to suppress.

On July 14, 1978, trial was had before a jury in the courtroom of the Honorable Roland Riggs, Judge of the Court of Common Pleas, sitting by assignment. On July 18, 1978, the jury returned a verdict of guilty on each count of the indictment, and the petitioner was forthwith sentenced.

From that verdict and judgment, petitioner appealed to the Court of Appeals of Ohio, Eighth District, Cuyahoga County. On March 3, 1980, the Court of Appeals affirmed the judgment of the Court of Common Pleas as to counts one and three of the indictment upholding the validity of the search warrant. The court reversed the conviction on count two of the indictment on issues which are not relevant before this Court and remanded for resentencing.

From the decision of the Court of Appeals of Ohio, the Petitioner filed a motion for leave to appeal in the Ohio Supreme Court. On June 6, 1980, that Court overruled the motion for leave to appeal and dismissed the Petitioner's appeal for the reason that "no substantial constitutional question exists". On June 27, 1980, the Supreme Court of Ohio denied Petitioner's motion for rehearing.

REASONS FOR DENYING THE WRIT

1. The trial court did not act contrary to the Fourth Amendment of the United States Constitution, when it denied the motion to suppress evidence seized in the search of Petitioner's home, pursuant to a lawful search warrant.

2. This Court has adequately delineated the principles to be applied by courts when assessing the timeliness of information provided by an informant, to establish the requisite probable cause necessary for issuance of search warrant.

3. The decision of the Ohio Supreme Court and the lower state courts herein are fully consistent with this Court's decision in *Aguilar v. Texas* (1964), 378 U.S. 108 and *Spinelli v. United States* (1969), 383 U.S. 410.

Petitioner's brief indicated that the affidavit was based on hearsay declarations of an unidentified informant. That is not entirely true since a portion of the facts enunciated in the affidavit was based on the direct observations of Detective Rutt and/or Detective Neelon (i.e., the cocaine in the possession of the informant, the address book in the possession of the informant and the telephone conversations between the informant and the appellant). Beyond that, an affidavit is not defective simply because it is based on hearsay declarations of an unidentified informant. "Double hearsay" is even permissible. *Rugendorf v. United States* (1964), 376 U.S. 528.

Nor does the affidavit have to allege that the informant was known to the police or had previously supplied reliable information. The Ohio Supreme Court, in *State v. Karr* (1975), 44 Ohio St. 2d 163 and in *State v. Haynes* (1971), 25 Ohio St. 2d 264, quoted with approval the fol-

lowing language from this Court in *Jones v. United States,* (1960), 362 U.S. 257:

> "Although the fact that an informant has previously supplied reliable information carried some weight, the determination of reliability or credibility cannot be based solely upon that fact. To do so, would necessarily do away with informants, since no one could ever qualify as a reliable informant the first time."

The United States Supreme Court in *United States v. Harris* (1971), 403 U.S. 573, specifically indicates that an averment of previous reliability of the informant is not necessary for a finding of probable cause.

What is necessary is that the affidavit recite some underlying facts and circumstances from which the magistrate could determine (1) that the informant was credible or his information reliable and (2) that there were narcotics at the home of the petitioner. *Aguilar v. Texas* (1964), 378 U.S. 108, and *Spinelli v. United States* (1969), 383 U.S. 410.

The following facts and circumstances support the reliability of the informant and his information:

First, according to the affidavit, the informant was arrested with two ounces of cocaine in his possession. This supports the proposition that the informant would know people involved with drugs and also supports his statement that he was to make a delivery of cocaine to the petitioner on the night in question.

Second, according to the affidavit, the informant was arrested with a notebook in his possession which contained the name and phone number of the petitioner. This supports the proposition that the informant knew the petitioner and where the petitioner lived.

Third, according to the affidavit, the informant, upon arrest, admitted that he was to deliver two ounces of cocaine to the petitioner. Clearly this amounted to an admission of criminal intent which went beyond mere possession of a controlled substance. The admission ran to the sale of cocaine. Such admissions against interest "carry their own indicia of credibility—sufficient at least to support of finding of probable cause to search" according to at least four of this Court's Justices in *United States v. Harris, supra,* at 583.

Fourth, according to the affidavit, a telephone conversation was overheard by Detective Rutt between the informant and an individual who identified himself as the petitioner wherein the petitioner told the informant to bring the cocaine to his home at 12590 Lake Avenue because customers were coming.

Fifth, according to the affidavit, after the notebook had been found, Detective Neelon told the informant to call the number listed to the petitioner in the notebook. The informant had a conversation with a party named Earle wherein the petitioner told the informant to get over right away because customers were waiting. Detective Neelon overheard this conversation.

These conversations support the following propositions:

(1) That the informant's notebook was accurate,

(2) That the informant did know the petitioner,

(3) That the informant did know where the petitioner lived and was to make a cocaine delivery there,

(4) That the informant had been in recent contact with the petitioner to set up the cocaine exchange,

(5) That the petitioner was currently involved with drugs.

It is clear that the affidavit provides more than sufficient information for the magistrate to determine with probable cause that the informant and the informant's information were reliable.

The following facts and circumstances support the proposition that there was probable cause to believe that there would be narcotics at the petitioner's home on the night in question.

First, according to the affidavit, the informant had *personally* been to the petitioner's home on *numerous* occasions. As a result, the fact that there is probable cause to believe a crime was being committed on the night in question (i.e., possession of various controlled substances) is based not on mere rumor or speculation but on the personal observations of the informant.

Second, according to the affidavit, the petitioner *always* had marijuana in plain view in the house. Although this was stated in the past tense, it clearly shows a continuing pattern of behavior over numerous occasions with marijuana always present.

Third, according to the affidavit, the petitioner used cocaine and "he would have his own personal supply . . . in addition to the two ounces of cocaine he was to purchase". This is stated in the present tense and the information was received from the informant on the same day the affidavit was filed with the magistrate.

Fourth, according to the affidavit, there were two telephone conversations between the informant and the petitioner on the day in question which indicate that the informant and the petitioner were maintaining an active relationship at that very time and that the petitioner was at that very time still involved with drugs.

Regarding the timeliness of information, various federal circuit courts have held that there is no arbitrary

time limit on how old information contained in an affidavit may be, so long as there are sufficient facts to justify a conclusion that the subject contraband is probably on the person or premises to be searched at the time the warrant is issued. See *United States v. Johnson* (10th Cir. 1972), 461 F.2d 285; *Durham v. Johnson* (9th Cir. 1968), 403 F.2d 190; *United States v. Guinn* (5th Cir. 1972), 454 F.2d 29; *Schoeneman v. United States* (D.C. Cir. 1963), 317 F.2d 173. This Court should continue this case-by-case analysis of the timeliness question. There is no need for further delineation than has already been made.

In the case at bar, the affidavit disclosed that the informant had "always" observed marijuana in petitioner's premises during his "numerous" visits. This information clearly suggests a continuing pattern of behavior. That petitioner was continuing this pattern of behavior at the time the warrant was issued was reinforced in the affidavit by the two telephone conversations which occurred on the date the warrant was issued between the informant and petitioner. These conversations disclosed that petitioner was engaged in a continuing course of conduct which involved the possession of illegal drugs. As the Tenth Circuit Court of Appeals pertinently stated:

> "Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, *where the affidavit properly recites facts indicating activity of a protracted and, continuous nature, a course of conduct, the passage of time becomes less significant.*" (Emphasis added).

United States v. Johnson, supra, at 287.

These facts and circumstances indicate that there was probable cause to believe controlled substances would be

present at the petitioner's home and that the information was not stale.

This Court has already given guidelines for the review of affidavits such as the one in question:

> "The Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by the non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this arena. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting this evidence to a judicial officer before acting. *United States v. Ventresca* (1965), 380 U.S. 102 at 108 (This language is also cited with approval in *United States v. Harris, supra*)."

The Ohio Supreme Court in *State v. Haynes* (1971), 25 Ohio St. 2d 264 at 268 and 269, following this Court's lead in *Jones v. United States, supra,* enunciated the following guidelines:

> "In determining the reliability of the information, the magistrate must consider the facts presented to him, and if such facts would cause a reasonable man to believe there are grounds for believing that the contraband is on the premises sought to be searched, he is justified in believing in the reliability of the informant. It must be remembered that the probable cause necessary to justify the issuance of a search warrant requires less facts than are necessary for

conviction, and the amount and method of proof is less strict. *Jones v. United States* (1960), 362 U.S. 257.

In this type of case, the court is concerned with probable cause, not certainty, and this extends to the determination of the reliability of the informer. It is not necessary to show uncontrovertible proof that the informer is reliable, but only that such information would cause a neutral and detached officer to believe there is sufficient substance to the statement to justify a search of the premises."

Since the affidavit in question does meet the two-pronged test enunciated by this Court in *Aguilar* and *Spinelli,* and since the affidavit does show timely information, there has been no violation of the petitioner's constitutional rights.

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any questions of constitutional dimension justifying review by the Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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